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No. 87-240

In the Supreme Court of the United States

OCTOBER TERM, 1987

MARY CATHERINE MIZE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that her second trial was barred by the Double Jeopardy Clause and that it was untimely under the Speedy Trial Act, 18 U.S.C. (& Supp. III) 3161 *et seq.*

1. Following a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted on seven counts of embezzling and misapplying bank funds, in violation of 18 U.S.C. 656, and on three counts of making false entries in bank records, in violation of 18 U.S.C. 1005. She was sentenced to concurrent terms of five years' imprisonment on five of the counts and to five years' probation on the remaining counts. The court of appeals reversed because of a variance between the allegations in the indictment and the proof at trial. Specifically, the indictment alleged that the bank involved was a "member bank of the Federal Reserve System," but the government instead proved at trial that the bank was insured by the Federal Deposit Insurance Corporation. 756 F.2d 353 (1985). Although proof of either fact was sufficient to establish a violation of the statutes under

which petitioner was charged, the court held that it was reversible error for the government to charge one theory in the indictment and rely on the other at trial. The court of appeals noted, however, that a second trial would not be barred by the Double Jeopardy Clause because petitioner's "guilt was established beyond a reasonable doubt" (756 F.2d at 357 & n.7). Accordingly, the court reversed petitioner's conviction "subject to reindictment and retrial" (*id.* at 354). The mandate issued on May 20, 1985.

On February 5, 1986, a second ten-count indictment was returned that again charged petitioner with misapplying bank funds and making false entries. Unlike the first indictment, the second indictment alleged that the bank was federally insured. A jury trial commenced within 69 days of the return of the second indictment. During trial, the original indictment was formally dismissed. Petitioner was convicted on all ten counts of the new indictment, and she was given the same sentence that she had received after the first trial.[1]

2. The court of appeals affirmed. The court rejected petitioner's claim that her retrial was barred by the Double Jeopardy Clause (Pet. App. 3a). In the first appeal, the court noted, it had held that the reversal of petitioner's conviction was not based on evidentiary insufficiency; "the government [had] presented convincing proof of *every* element of the charged offenses" (*id.* at 4a (emphasis

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[1] The evidence at the second trial, as summarized in the government's brief in the court of appeals, showed that petitioner was the head teller at the Angleton Bank of Commerce in Angleton, Texas, a federally insured bank. On November 9, 1981, petitioner withdrew $25,000 from the account of bank customer Grace Ford without Ford's knowledge or authorization. Then, between May 15 and June 4, 1982, petitioner forged five checks, totalling $20,000, on the account of customer Mary Orsak and kept the proceeds for herself. Finally, in March 1983, petitioner misappropriated nine deposits, totaling $34,000, that belonged to the Southland Corporation.

in original)). Instead, the court had reversed her original convictions because "the government proved and the trial judge instructed the jury on an element different than that charged in the indictment," namely that the Angleton Bank was an "insured bank" rather than a "member bank" (*ibid.*). Therefore, the court held, the Double Jeopardy Clause did not prohibit the government from reprosecuting petitioner on a new indictment.

The court also rejected petitioner's claim that her second trial did not commence within the time limits of the Speedy Trial Act, 18 U.S.C. (& Supp. III) 3161 *et seq.* Petitioner argued that she should have been tried within 70 days of the issuance of the court's mandate reversing her original convictions. The 70-day time limit of the Act did not start anew with the return of the second indictment, she claimed, because at that time the original indictment was still outstanding. Because 330 days had elapsed between the issuance of the mandate and the commencement of the second trial, petitioner claimed that the Act was violated.

The court of appeals disagreed. The court noted that pursuant to Section 3161(d)(1) of the Act, the return of a superseding indictment triggers a new 70-day period for commencing trial whenever the original indictment is dismissed "upon motion of the defendant" (Pet. App. 5a-10a). Here, it was at petitioner's urging that the court of appeals, in its first decision, had reversed her convictions "subject to reindictment and retrial" (756 F.2d at 354). The court of appeals thus effectively dismissed the first indictment in its disposition of the first appeal (Pet. App. 8a-9a). Accordingly, the court reasoned, the formal dismissal of the original indictment during the second trial was nothing more than an "inconsequential, ministerial act" (*id.* at 9a). Had petitioner desired, "she could have had the [original indictment] formally dismissed at any time" (*ibid.* (footnote omitted)).

The court rejected petitioner's argument that this case should be controlled by Section 3161(e), which requires that trial commence within 70 days from "the date the action occasioning the retrial becomes final." In reversing the original convictions, the court of appeals did not order a retrial. Indeed, the court explained, the Double Jeopardy Clause precluded a retrial on the original indictment since it charged that the Angleton Bank was a member bank of the Federal Reserve System, and the government failed to prove that allegation, proving instead an alternative, but uncharged, jurisdictional basis for the offenses. Pet. App. 10a.

3. The court of appeals correctly ruled that petitioner's second trial was not barred by the Double Jeopardy Clause. Contrary to petitioner's contention, her original convictions were not reversed on the ground of insufficiency of the evidence. The government proved every element of the charged offenses, including the jurisdictional element. Compare *Burks* v. *United States*, 437 U.S. 1 (1978) (government failed to prove the element of intent). Sections 656 and 1005 give alternative bases for establishing federal jurisdiction. The involved bank must be either a "Federal Reserve bank, member bank, national bank, or insured bank." Here, the government proved beyond a reasonable doubt at the first trial that the Angleton Bank of Commerce was an "insured bank," since the evidence showed that it was insured by the FDIC. The first indictment alleged, however, that the Angleton Bank was a "member bank." Therefore, although the government proved every element of the offenses, the government did not prove the specific jurisdictional basis that was charged in the indictment. Thus, there was a variance between the allegation in the indictment and the proof at trial.

The second trial did not give the government a second chance to prove what it failed to prove at the first trial. The second indictment alleged that the bank was an "insured bank," and the government proved that charge. The second trial thus simply cured what the court of appeals had found to be a legal error infecting the first judgment. The correction of that legal error by reindictment and retrial therefore did not violate the Double Jeopardy Clause. See *United States* v. *Ball*, 163 U.S. 662 (1896).[2]

4. Petitioner's speedy trial claim also lacks merit. Relying on Section 3161(e) of the Act, petitioner contends (Pet. 13-15) that she should have been "retried" within 70 days of the issuance of the mandate following the reversal of her original convictions. She could not, however, be "retried" on the original indictment. Because Section 3161(e), by its plain terms, applies only to "retrial[s]," it has no application here.[3]

The court of appeals correctly determined that Section 3161(d)(1) applies in the unusual circumstances of this case.[4] That section provides that the 70-day period for

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[2] For that reason, the decision below does not conflict with either *United States* v. *Shively*, 715 F.2d 260 (7th Cir. 1983), cert. denied, 465 U.S. 1007 (1984), or *United States* v. *Platenburg*, 657 F.2d 797 (5th Cir. 1981), on which petitioner relies. There was no double jeopardy issue in those cases, because in both there was only one trial. And unlike the instant case, there was no variance in the trials in *Shively* and *Platenburg*; there was simply a failure of proof. In each case, the indictment alleged that the pertinent bank was federally insured. The government attempted to prove that allegation but fell short in its proof. The government did not prove an alternative basis for federal jurisdiction, as it did here.

[3] Even if the second trial is denominated a "retrial" and Section 3161(e) applies here, the 70-day period does not begin to run until "the action occasioning the retrial becomes final." In this case, the return of the second indictment was the "action occasioning the retrial," since petitioner could not be retried on the original indictment. Accordingly, even if Section 3161(e) is applicable to this case, the second trial was timely.

[4] Although petitioner disagrees with the court of appeals that this case is a "novel one" (see Pet. 13), she cites no other case like it.

commencing trial begins anew upon reindictment when the original indictment is "dismissed upon motion of the defendant." Petitioner argues that the original indictment was not dismissed on her motion; rather, it was dismissed on the government's motion during the second trial. But this argument exalts form over substance. Petitioner precipitated the dismissal. At petitioner's behest, the court of appeals reversed her original conviction "subject to reindictment" (756 F.2d at 354). In light of that decision, the original indictment effectively became a nullity; in essence, the court of appeals dismissed the indictment even if the dismissal was not recorded on the docket sheet. The government's subsequent motion was therefore made merely as a ministerial matter following petitioner's victory in the court of appeals. Petitioner's trial commenced within 69 days of the return of the second indictment, and the Act therefore was not violated.[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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[5] *United States* v. *Harris*, 724 F.2d 1452 (9th Cir. 1984), does not aid petitioner. In *Harris*, the original indictment was dismissed after a superseding indictment was returned. The court held that Section 3161(d)(1) applies only when an indictment is dismissed and *thereafter* a superseding indictment is returned. *Id.* at 1454. In *Harris*, the original indictment had not been constructively dismissed by any court prior to the return of the superseding indictment. In contrast, the court of appeals in this case constructively dismissed the original indictment long before the second indictment was returned. Accordingly, the *thereafter* requirement of *Harris* was satisfied.

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